

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY LEE RITCHIE,

Defendant-Appellant

UNPUBLISHED

February 4, 2000

No. 213136

Otsego Circuit Court

LC No. 97-002217-FH

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of falsely reporting a felony, MCL 750.411a; MSA 28.643(1), and sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a prison term of ten to fifteen years' imprisonment. We affirm.

Defendant first claims that the trial court erred when it admitted evidence of a nonsufficient funds check case pending against him in another county and of his alleged attempt to suborn perjury in that case. Defendant argues that these other acts were substantially more prejudicial than probative. We disagree.

We review a trial court's decision to admit evidence under an abuse of discretion standard. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); citing *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). A decision on a close evidentiary question cannot ordinarily be an abuse of discretion. *Bahoda, supra*. An abuse of discretion exists only if an unprejudiced person, after considering the facts on which the trial court acted, would say there was no justification for the ruling. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999); *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

MRE 404(b) governs the admission of evidence of "other crimes, wrongs, or acts" and provides in relevant part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however,

be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material [MRE 404(b)(1).]

The use of other acts as evidence of a defendant's character is excluded except as authorized by this rule to avoid the danger of conviction based on a defendant's history of misconduct. *Starr, supra* at 495. Evidence is admissible under MRE 404(b) if it "is (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice." *People v Ho*, 231 Mich App 178, 185; 585 NW2d 357 (1998), quoting *Starr, supra* at 496-497, and *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Furthermore, upon request the trial court may provide a limiting instruction to the jury. *VanderVliet, supra* at 75.

The evidence objected to on appeal was that defendant faced felony charges for a nonsufficient funds check in another county, and attempted to suborn perjury from the victim in this case in order to support his defense to the nonsufficient funds check charge. The prosecution sought the admission of this evidence to assist the jury in finding a motive for the false report in this case and to show that defendant knowingly made the false report, as well as to support the nonexistence of the embezzlement he reported to the Michigan State Police. Hence, the proposed purposes for the admission of this evidence were proper. MRE 404(b)(1). The charge against defendant, false report of a felony, required the prosecution to prove that the reported felony did not occur and that defendant knew that when he made his report to the police. MCL 750.411a(1); MSA 28.643(1)(1). The other acts evidence, by showing a possible motive for the false report, tended to make it more likely that the embezzlement never occurred, and that defendant knew that when he made his report. Thus, the evidence was relevant to facts of consequence at trial. *VanderVliet, supra* at 74-75.

Furthermore, defendant's alleged statements to the victim in this case would not, in any event, be excluded under MRE 404(b)(1), which only excludes acts, and does not exclude statements of a defendant. *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989), aff'd 437 Mich 149 (1991), citing *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988). The statements of defendant offered by the prosecution in this case were admissible as admissions of a party opponent. MRE 801(d)(2); *People v Kowalak*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). The only inquiry is whether the statements were relevant. *Rushlow, supra* at 176. We have concluded above that they were.

Defendant argues that a proper balancing of the probative value of the bad check evidence against the potential prejudice to defendant from the use of that evidence should have led the trial court to exclude it because the prosecution could have established a motive for defendant's false report merely with testimony of an overdraft. We disagree. We note that "[t]he people are not required to present their case on any theory of alternative proofs." *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972). It is not plausible that overdrawing one's checking account would lead a person to knowingly make a false report of a felony to the police. Nor do we agree that the evidence was

otherwise substantially more prejudicial than probative. MRE 403; *VanderVliet, supra* at 86. Accordingly, we conclude that the trial court did not abuse its discretion by admitting the challenged evidence.

Defendant next contends that his sentence is disproportionate. Again, we disagree. We review a trial court's sentence imposed on an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). "[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). However, our Supreme Court has stated "[A] trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *Hansford, supra* at 326.

As a fourth felony offender whose underlying felony was punishable by less than five years' imprisonment, defendant could be sentenced to the legislatively set maximum term of fifteen years. MCL 769.12(1)(b); MSA 28.1084(1)(b). The presentence investigation report showed that defendant has an extensive criminal record. He is approximately fifty years of age, and it is evident that prior attempts to rehabilitate him have failed. The trial court expressly referred to defendant's past conduct as discussed in the presentence investigation report. Pursuant to *Hansford, supra* at 326, given the nature of the underlying crime and the evidence of defendant's inability to conform his conduct to the law, defendant's sentence is proportionate and the trial court did not abuse its sentencing discretion.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Donald S. Owens